SUBRAMANIAM NS DHURAI

v.

SANDRAKASAN RETNASAMY & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
DENIS ONG JCA
[CIVIL APPEAL NO: B-03-388-1998]
10 JUNE 2004

LAND LAW: *Indefeasibility of title and interests - Transfer of land - Vendor having no valid title - Purchaser not bona fide purchaser for value - Whether transfer null and void - Whether to be set aside - Indefeasibility at time of transfer - Whether only deferred indefeasibility - Adorna Properties Sdn Bhd v. Boonsom Boonyamit - Whether decided per incuriam - Whether not to be followed - National Land Code, ss. 5, 340(1), (2), (3)*

CONSTITUTIONAL LAW: *Courts - Stare decisis - Court of Appeal - Whether bound by decision of Federal Court - Whether could refuse to follow if decision of apex court arrived at in ignorance of terms of statute*

WORDS & PHRASES: *"Proprietor" - "Purchaser" - National Land Code, s. 340(1), proviso to s. 340(3)*

This was an appeal against the decision of the learned High Court judge setting aside the transfer of a piece of land to the appellant on the grounds that the land was a trust property, that the vendor had no good title thereto, and that the appellant, on the facts, was not a *bona fide* purchaser for value of the land. Before the Court of Appeal, the question of whether the appellant had, at the point of transfer, obtained immediate or deferred indefeasibility, came to the forefront of consideration, and the learned judges, in the circumstances, took the liberty to deliberate on the ramifications of s. 340 National Land Code ('the Code'), and subsequently on the judgment of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyamit ('Adorna Properties')*, not least that aspect of its ruling that the proviso to s. 340(3) of the Code was dealing only with one category of registered proprietors, namely purchasers in good faith and for value, and that, for this category of registered proprietors, they could still obtain immediate indefeasibility notwithstanding that the titles were acquired through forged documents. And, in the ultimate, apart from the question of whether the trial judge was justified in setting aside the transfer,

the court deemed it wise to ask further whether *Adorna Properties* represented good law, and if not, whether the Court of Appeal and the High Court, and other inferior courts, were bound to apply the law as it stands or had the freedom to depart from it.

Held

Per Gopal Sri Ram & Ahmad Fairuz JJCA (dismissing the appeal):

[1] Applying the *nemo dat* rule, the vendor herein had nothing and could therefore pass nothing to the appellant. The appellant may have obtained good title if he had been a *bona fide* purchaser of the subject land. But he was found – and correctly found – by the learned judge not to be a *bona fide* purchaser. So, as a matter of law, the learned judge was right in setting aside the transfer to the appellant. (p 547 a)

[2] Considering the distinctive use of the terms "proprietor" and "purchaser" in s. 340 of the Code, and the separate definitions given to them by s. 5, the "proprietor" in s. 340(1) is not the same person as the "purchaser" in the proviso to s. 340(3). (p 548 c-d)

[3] Section 340 of the Code, properly, should be read as follows. The title of a registered proprietor is indefeasible and good against the whole world, but not so in cases where it has been obtained by fraud, forgery, by means of an insufficient or void instrument, or by the exercise of a power purportedly conferred by written law. If a title is acquired by any of these means, the title of the acquirer is liable to be set aside in the hands of the acquirer and all those to whom he transfers the land except a *bona fide* purchaser for valuable consideration. However, the fact that the title of a registered proprietor is indefeasible does not prevent the land from being forfeited or sold under a statutory power. Neither does it prevent the title from being defeated by operations of law. (pp 548 h & 549 a)

[4] The Federal Court in *Adorna Properties*, in ruling that the registered proprietors therein had obtained immediate indefeasibility notwithstanding that they had acquired their titles under a forged document, had equated a "proprietor" with a "purchaser". In doing so, the court overlooked s. 5 of the Code that provided separate definitions of these two words indicating in clear terms that they are of different statutory concepts. The court, further, had also overlooked the decision of the Supreme Court in *M& J Frozen Foods Sdn Bhd v. Siland Sdn Bhd ('M & J Frozen Foods').* (p 550 a)

[4a] Clearly, if the Federal Court in *Adorna Properties* had hearkened to written law and to precedent, the steps of logical reasoning would have been as follows. Pursuant to s. 340(1) of the Code, Adorna was the proprietor "for the time being registered", that is to say, at the date on which *Boonsom Boonyamit* claimed title to the land as true owner. However, at that point of time, Adorna had obtained its title under a forged document. Accordingly, Adorna's case fell within s. 340(2)(b) of the Code since "registration was obtained by forgery, or by means of an insufficient or void instrument". Therefore, Adorna's title was defeasible. Put shortly, Adorna was the registered proprietor under s. 340(1) but not a purchaser within the proviso to s. 340(3). And by contrast, if Adorna had later sold and transformed the land to a third party, then s. 340(2)(b) would not be applicable because the transfer would not be a forgery. The third party's title would be protected by the proviso to s. 340(3) if he paid value and acquired the land without notice of the forged transfer in Adorna's favour. This points to deferred and not to immediate indefeasibility. (pp 551 h & 552 a-b)

[5] Since the Federal Court in *Adorna Properties* did not have regard to the earlier decision of *M & J Frozen Foods*, and worse, to s. 5 of the Code, this court would not allow itself to fall over the proverbial cliff but would strike out in the right direction (see *New York Life Insurance Co v. Styles*). Our courts, therefore, should no longer treat themselves as bound by *Adorna Properties*, it being decided *per incuriam*, but must proceed on the basis that the Code has provided for deterred and not immediate indefeasibility. (pp 551 e & 552 c)

[5a] *Young v. Bristol Aeroplane Co Ltd* is authority for the proposition that where there were conflicting decisions of the Court of Appeal, this court is free to choose which it will follow. Admittedly, the observations in *Young v. Bristol Aeroplane* referred to the Court of Appeal. However, there is no difference in principle in relation to this court and the Federal Court. If it is demonstrated that a decision of the Federal Court was arrived at "in ignorance of the terms of a statute", then this court would not be bound to apply it. (p 550 f-g)

[6] The finding of the court below that the appellant was not a *bona fide* purchaser is one of pure fact based on the credibility of witnesses. And so, in accordance with well settled practice, this court would not interfere with such finding. (p 552 e)

Per Ahmad Fairuz JCA:

[1] Saya bersetuju dengan penghakiman Gopal Sri Ram HMR kecuali setakat mana penghakiman itu menyatakan bahawa keputusan Mahkamah Persekutuan di dalam *Adorna Properties* adalah *per incuriam* dan oleh itu mahkamah-mahkamah tidak perlu lagi menganggap mereka terikat dengan keputusan itu. (ms 552 g)

[2] Berasaskan prinsip duluan kehakiman mengikat, mahkamah ini tidak mempunyai pilihan kecuali menerima dan mematuhi keputusan Mahkamah Persekutuan di dalam *Adorna Properties*. Semua mahkamah yang bidang kuasanya lebih rendah dari Mahkamah Persekutuan hendaklah mematuhi kes itu sehingga ianya ditolak atau digantikan dengan kes perundangan yang lain dari Mahkamah Persekutuan. (ms 552 h & 554 c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif hakim Mahkamah Tinggi kerana mengenepikan pindahmilik sebidang tanah kepada perayu atas alasan bahawa tanah tersebut adalah tanah amanah, bahawa penjual tidak mempunyai hakmilik sah terhadapnya dan bahawa perayu, berdasarkan fakta, bukanlah seorang pembeli tanah *bona fide* dengan nilai. Di hadapan Mahkamah Rayuan, persoalan sama ada perayu, semasa pindahmilik, telah memperoleh ketakbolehsangkalan serta merta atau ketakbolehsangkalan tertangguh, telah berbangkit untuk pertimbangan, dan yang arif hakim-hakim, atas keadaan yang wujud, mendapatinya perlu untuk meneliti ramifikasi s. 340 Kanun Tanah Negara ('Kanun'), dan kemudiannya, penghakiman Mahkamah Persekutuan dalam *Adorna Properties Sdn Bhd v. Boonsom Boonyamit ('Adorna Properties')*, terutama tentang aspek keputusannya yang menyatakan bahawa proviso kepada s. 340(3) Kanun hanya menyentuh satu kategori tuan punya berdaftar sahaja, iaitu pembeli *bona fide* dengan nilai, dan bagi kategori tuan punya berdaftar yang seperti ini, mereka masih berhak memperoleh ketakbolehsangkalan walaupun hakmilik yang berkenaan itu diperolehi melalui dokumen palsu. Dan, pada akhirnya, selain dari persoalan sama ada hakim bicara betul dalam mengenepikan pindahmilik, mahkamah merasa wajar untuk bertanya selanjutnya sama ada *Adorna Properties* mencerminkan kedudukan sebenar undang-undang, dan jika tidak, sama ada Mahkamah Rayuan dan Mahkamah Tinggi, serta mahkamah-mahkamah rendah lain, wajib menggunapakai undang-undang sedia ada ini, ataupun mempunyai kebebasan untuk menyimpang darinya.

Diputuskan
Oleh Gopal Sri Ram & Ahmad Fairuz HHMR (menolak rayuan):

[1] Memakai kaedah *nemo dat*, penjual di sini tidak mempunyai apa-apa dan kerana itu tiada apa yang boleh dipindah-milikkannya kepada perayu. Perayu mungkin mempunyai hakmilik sah jika ia merupakan seorang pembeli *bona fide* tanah tersebut. Tetapi beliau telah didapati oleh hakim bicara – dan didapati dengan betulnya – sebagai bukan seorang pembeli *bona fide*. Jadi, sebagai suatu perkaran undang-undang, yang arif hakim betul apabila mengenepikan pemindahan kepada perayu.

[2] Mengambil kira penggunaan perkataan-perkataan "tuan punya" dan "pembeli" di dalam s. 340 Kanun, dan definasi berasingan diberikan kepada perkataan-perkataan tersebut oleh s. 5, "tuan punya" di dalam s. 340(1) bukanlah "pembeli" yang disebut di proviso kepada s. 340(3).

[3] Seksyen 340 Kanun, secara betulnya, harus dibaca seperti berikut. Hakmilik seorang tuan punya berdaftar adalah tak boleh disangkal oleh sesiapa, kecuali dalam kes di mana ia diperolehi melalui fraud, pemalsuan, melalui dokumen yang tidak memadai atau cacat, atau melalui pelaksanaan kuasa yang didakwa diberikan oleh undang-undang bertulis. Jika hakmilik diperolehi melalui mana-mana cara ini, hakmilik pemeroleh tersebut boleh dilucutkan darinya dan begitu juga dengan orang-orang yang menerima pindah milik tanah itu darinya kecuali bagi seorang pembeli *bona fide* dengan nilai. Walau bagaimanapun, fakta bahawa hakmilik seseorang tuan punya itu tak boleh disangkal tidak menghalang tanah tersebut dari dirampas atau dijual di bawah kuasa statut. Hakmilik tersebut juga boleh tersangkal oleh kuatkuasa undang-undang.

[4] Mahkamah Persekutuan dalam *Adorna Properties*, dalam memutuskan bahawa tuan punya berdaftar di situ telah mendapat ketakbolehsangkalan serta merta walaupun mereka memperoleh hakmilik melalui dokumen-dokumen palsu, telah menyamakan "tuan punya" dengan "pembeli". Dalam memutuskan sedemikian, mahkamah jelas membelakangi s. 5 Kanun yang menyedia definasi berasingan untuk kedua-dua perkataan tersebut sekaligus menunjukan dengan jelas bahawa perkataan-perkataan itu merangkum konsep statut yang berbeza. Mahkamah, selain itu, telah juga membelakangi keputusan Mahkamah Agong dalam *M & J Frozen Foods v. Siland Sdn Bhd.*

[4a] Adalah jelas bahawa, sekiranya Mahkamah Persekutuan dalam *Adorna Properties* menumpu kepada undang-undang bertulis dan penghakiman duluan, langkah-langkah rasionalisasi kesnya tentulah akan menjadi seperti berikut. Berdasarkan s. 340(1) Kanun, Adorna adalah tuan punya "berdaftar untuk sementara waktu", yakni, pada tarikh di mana Boonsom Boonyamit menuntut hakmilik ke atas tanah sebagai tuan punya sebenar. Bagaimanapun, pada waktu tersebut, Adorna memperoleh hakmilik di bawah dokumen yang dipalsukan. Oleh yang demikian, kes Adorna adalah tertakluk di bawah s. 340(2) Kanun oleh kerana "pendaftaran diperolehi melalui pemalsuan, atau melalui penggunaan instrumen yang batal atau tidak memadai". Oleh itu, hakmilik Adorna adalah boleh disangkal. Denagn lain perkataan, Adorna adalah tuan punya berdaftar di bawah s. 340(1) tetapi bukan seorang pembeli seperti yang dimaksudkan oleh proviso s. 340(3). Sebaliknya, jika Adorna kemudian dari itu menjual dan melupuskan hartanah kepada pihak ketiga, s. 340(2) tidaklah terpakai oleh kerana pindahmilik tersebut bukan suatu pemalsuan. Hakmilik pihak ketiga adalah dilindungi oleh proviso s. 340(3) jika beliau membayar nilai dan memperoleh tanah tanpa notis mengenai pindahmilik yang dipalsukan untuk manfaat Adorna. Ini menunjuk kepada ketakbolehsangkalan tertangguh dan bukan ketakbolehsangkalan serta merta.

[5] Oleh kerana Mahkamah Persekutuan dalam *Adorna Properties* tidak mempertimbang keputusan terdahulu *M & J Frozen Foods*, dan lebih dari itu, telah membelakangi s. 5 Kanun, maka mahkamah ini tidak akan mengulangi kesilapan yang sama tetapi akan bertindak menyimpang ke arah yang betul (lihat *New York Life Insuarnce Co v. Styles*). Mahkamah-mahkamah kita, dengan itu, tidak harus menganggap diri mereka sebagai masih terikat dengan *Adorna Properties*, yang diputuskan *per incuriam*, tetapi harus berpegang kepada asas bahawa Kanun telah memperuntukkan ketakbolehsangkalan tertangguh dan bukan ketakbolehsangkalan serta merta.

[5a] *Young v. Bristol Aeroplane Co Ltd* adalah autoriti bagi proposisi bahawa di mana terdapat keputusan Mahkamah Rayuan yang bertentangan, mahkamah ini bebas untuk memilih keputusan mana yang hendak diikutinya. Memanglah *Young v. Bristol Aeroplane* merujuk kepada Mahkamah Rayuan. Namun, tiada beza dari segi prinsipnya dalam hubungan mahkamah ini dengan Mahkamah Persekutuan. Sekiranya terbukti bahawa sesuatu keputusan Mahkamah Persekutuan itu telah dicapai "secara yang membelakangi terma-terma statut", maka mahkamah ini tidaklah terikat untuk melaksanakannya.

[6] Dapatan mahkamah di bawah bahawa perayu bukan seorang pembeli *bona fide* adalah suatu dapatan fakta sepenuhnya yang didasarkan kepada kebolehpercayaan saksi-saksi. Atas sebab itu, selaras dengan amalan yang dipakai, mahkamah ini tidak akan campur tangan dalam rumusan itu.

Oleh Ahmad Fairuz HMR:

[1] I agree with the judgment of Gopal Sri Ram JCA except in so far as it adverts to the decision of the Federal Court in *Adorna Properties* as being *per incuriam* with the result that the courts may no longer treat themselves as bound by it.

[2] Upon the principle of *stare decisis*, this court has no option but to follow and apply the Federal Court in *Adorna Properties*. Indeed, all courts whose jurisdiction is inferior to the Federal Court must abide by this case until it is set aside or dismissed by another decision of the Federal Court.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC ***(refd)***
Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Inland Revenue Commissioners v. Australian Mutual Provident Society [1947] AC 605 ***(refd)***
M & J Frozen Foods Sdn Bhd v. Siland Sdn Bhd [1994] 2 CLJ 15 SC ***(refd)***
Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp [1979] Ch 384 ***(refd)***
New York Life Insurance Co v. Styles 14 App Cas 381 ***(refd)***
Ong Chat Pang & Anor v. Valiappa Chettiar [1971] 1 MLJ 224 ***(refd)***
Ostime v. Australian Mutual Provident Society [1960] AC 459 ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Teh Bee v. K Maruthamuthu [1977] 2 MLJ 7 ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1944] KB 718 ***(refd)***

Legislation referred to:

National Land Code, ss. 5, 340(1), (2), (3)(a), (b)

For the appellant - Jadadish Chandra; M/s Arbain & Co
For the respondents - R Devadason; M/s Devadason & Devadason

[Appeal from High Court, Shah Alam; Civil Suit No: 22-155-1992]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

The respondents are the children of Retnasamy Naina ("the deceased) by his second wife. The appellant was the 3rd defendant in the court below. There were three other defendants before the High Court but they are not appealing against the orders made by the learned judge. The 3rd defendant purchased the land held under EMR 6693 for Lot No 5079 in the Mukim of Kapar ("the subject land") from one Supia, the deceased's son by his first wife and the 1st defendant in the court below. The learned judge found that the subject land was trust property, that the 1st defendant had obtained the issue document of title from the 1st respondent, that the 1st defendant had no interest in the subject land and that the appellant was not a *bona fide* purchaser. He accordingly granted the respondents a declaration that the transfer to the appellant was null and void, set aside the transfer and made other consequential orders.

The learned judge's finding that since the 1st defendant had no interest in the land he was incapable of passing any to the appellant is, in my judgment a correct direction of law. It finds support from the decision of the Supreme Court in *M & J Frozen Foods Sdn Bhd v. Siland Sdn Bhd* [1994] 2 CLJ 15. There is a passage in the judgment of Wan Yahya SCJ in that case which is directly applicable to the present appeal:

> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had – *nemo dat quod non habet.* There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s. 340(3) of our National Land Code 1965 where a *bona fide* purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, **the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility,** – see *Gibbs v. Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside. (emphasis added.)

Applying the *nemo dat* rule, the 1st defendant had nothing and could therefore pass nothing to the appellant. The appellant may have obtained good title if he had been a *bona fide* purchaser of the subject land. But he was found – and in my view, correctly found – by the learned judge not to be a *bona fide* purchaser. So, as a matter of law, the learned judge was right in setting aside the transfer to the appellant.

I have used the expression "may" advisedly because, in my judgment, it is important to appreciate the circumstances to which the proviso to s. 340(3) of the National Land Code 1965 ("the Code") applies. For that purpose it is best that I set out the whole of s. 340. It reads as follows:

> 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
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> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

a There are some observations I would make of this provision. First, the section only comes into play when the title of a registered proprietor is challenged in an action brought for that purpose. It is at that point in time that the court must determine whether – to quote s. 340(1) – "the title or interest of any person or body for the time being registered as proprietor of any land" is b indefeasible. If there is no challenge as to title then, of course, the shield of indefeasibility protects the registered proprietor. See, *Teh Bee v. K Maruthamuthu* [1977] 2 MLJ 7.

Second, a plaintiff who challenges the title of the registered proprietor must, in order to succeed, bring his case within one or more of the three sub- c paragraphs of s. 340(2). Once he does that, the registered proprietor's title will be defeated.

Third, the section uses two distinct expressions "proprietor" and "purchaser". These are separately defined by s. 5 of the Code as follows:

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> 'proprietor' means any person or body for the time being registered as the proprietor of any alienated land;
>
> 'purchaser' means a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

e Hence, the "proprietor" in s. 340(1) is not the same person as the "purchaser" in the proviso to s. 340(3).

Fourth, by virtue of s. 340(3)(a), once the title of a registered proprietor is rendered defeasible on any of the grounds appearing in s. 340(2), it is liable to be set aside in the hands of all subsequent transferees. Further, by virtue f of s. 340(3)(b), if the proprietor whose title is defeasible grants an interest, for example, a lease, that interest may also be set aside.

Fifth, to the wide reaching power to set aside subsequent dealings with the title by a proprietor whose title is defeasible one exception is stipulated. A g *bona fide* purchaser for value of the land from a proprietor with a defeasible title is protected. That is the effect of the proviso to s. 340(3).

So, in my judgment, s. 340 should be read as follows. The title of a registered proprietor is indefeasible and good against the whole world. But it is not indefeasible in cases where it has been obtained by fraud, forgery, by means h of an insufficient or void instrument, or by the exercise of a power purportedly conferred by written law. If a title is acquired by any of these means, then the title of the acquirer is liable to be set aside in the hands of the acquirer and all those to whom he transfers the land except a *bona fide* purchaser for

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valuable consideration. However, the fact that the title of a registered proprietor is indefeasible does not prevent the land from being forfeited or sold under a statutory power. Neither does it prevent the title being defeated by operation of law.

It is on this basis that Wan Yahya SCJ held, in *M&J Frozen Foods Sdn Bhd v. Siland Sdn Bhd*, citing *Gibbs v. Messer* as authority, that an acquirer who obtains his title by means of a void or voidable instrument obtains deferred indefeasibility. Accordingly, where title is acquired by means of a forged instrument of transfer, the title of the acquirer may be set aside in his hands even if he is a *bona fide* purchaser. However, the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133, reversing this Court (whose judgment is reported in [1997] 3 CLJ 17) held that s. 340 of the Code admitted of immediate as opposed to deferred indefeasibility. Eusoff Chin CJ said:

> It is a cardinal rule of interpretation that a proviso to a particular section or provision of a statute only embraces the field which is covered by the main provision. The object of a proviso is to qualify or limit something which has gone before it. Its proper function is to except and deal with a case which would otherwise fall within the general language of the main provision of the statute, and its effect is confined to that case. In other words, the object of a proviso is to carve out from the substantive section or clause of a statute, a class or category of persons or things to whom or to which the main section does not apply. The proviso cannot be divorced from the main clause to which it is attached. It must be considered together with the section or subsection of the statute to which it stands as a proviso.
>
> The proviso to sub-s (3) of s. 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). *For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.*
>
> We therefore, agree with the High Court Judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said lands. (emphasis added.)

It can be seen at once that the Federal Court equated a "proprietor" with a "purchaser". In doing so it overlooked s. 5 of the Code that provides separate definitions of these two words indicating in clear terms that they are different statutory concepts. It also overlooked the decision of the Supreme Court in *M & J Frozen Foods.* Accordingly, I am of the very respectful view that the decision of the Federal Court is *per incuriam* and not good law.

In *Goverment of Malaysia v. Lim Kit Siang* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, Abdul Hamid CJ (Malaya) quoted with approval the following passage in the judgment of the English Court of Appeal in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718; [1946] AC 163 at p. 729:

> Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but **where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different.** It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. (emphasis added.)

Young v. Bristol Aeroplane Co Ltd is also authority for the proposition that where there are conflicting decisions of the Court of Appeal, this court is free to choose which it will follow. Further, in *Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp* [1979] Ch 384 Oliver J (later Lord Oliver of Aylmerton) suggested that where there are conflicting decisions of the Court of Appeal, a High Court is free to choose which decision to follow.

I accept that the observations in *Young v. Bristol Aeroplane Co Ltd* refer to the Court of Appeal. But I see no difference in principle in relation to this Court and the Federal Court. If it is demonstrated to a conviction that a decision of the Federal Court was arrived at – to borrow the words from *Young v. Bristol Aeroplane Co Ltd* – "in ignorance of the terms of a statute" are we nevertheless to apply it? I do not think so. In support I cite the following passage from the well respected work *"Jurisprudence"* by Professor Dias (1985):

> If the reasoning behind a decision is shown to have been faulty by a higher court, or even by a court of co-ordinate authority, that decision may again be disregarded.

In *Ostime v. Australian Mutual Provident Society* [1960] AC 459, the House of Lords had to consider its decision in *Inland Revenue Commissioners v. Australian Mutual Provident Society* [1947] AC 605 which had been decided without reference to the earlier decision of the House in *New York Life Insurance Co. v. Styles* 14 App. Cas. 381. Lord Denning said:

> And, as it happened, no doubt owing to the unusual course which was adopted, the House in 1947 was never referred to a very relevant decision of its own. It was never referred to the decision in *New York Life Insurance Co. v. Styles*, which holds that a mutual life assurance society does not make profits. … My Lords, I ask myself, What authority is to be given in these circumstances to the decision of this House in 1947? Is it to be followed from step to step regardless of consequences? Are we to hold that the tax under rule 3 is a tax on the profits of the business for all purposes, including the purposes of the Double Taxation Agreement, which this House never had in mind at all? I think not. The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps. And that is what I would ask your Lordships to do. (emphasis added.)

So too here. It is plain that the Federal Court in the *Adorna Properties* case did not have regard to the earlier decision of the Supreme Court in *M & J Frozen Foods*. Worse, it did not have regard to s. 5 of the Code. I do not think that I should fall off the proverbial cliff. I think that I must strike out in the right direction.

I take this view because the consequences of the judgment in *Adorna Properties* are startling. As a registered proprietor you can cling on to your issue document of title for dear life. Yet a rogue may by the use of forged documents obtain a duplicate of the issue document of title claiming the original to be lost and sell and transfer your land to a perfectly innocent purchaser. That is what happened in the *Boonsom Boonyanit* case. Yet, according to the judgment of the Federal Court, you cannot recover your property. The problem has arisen because, as I have already said, the Federal Court ignored the definition of "proprietor" and "purchaser" in s. 5 of the Code and also did not have regard to the *M & J Frozen Foods* case. If the Federal Court had hearkened to written law and to precedent, the steps of logical reasoning would have been as follows.

Pursuant to s. 340(1) of the Code, Adorna Properties was the proprietor "for the time being registered", that is to say, at the date on which Boonsom Boonyanit claimed title to the land as true owner. At that point in time Adorna Properties had obtained its title under a forged instrument. About that there was do doubt. Accordingly, Adorna's case fell within s. 340(2)(b) of the Code

because "registration was obtained by forgery, or by means of an insufficient or void instrument". Therefore Adorna's title was defeasible. Put shortly, Adorna was the registered proprietor under s. 340(1) and not a purchaser within the proviso to s. 340(3).

By contrast, if Adorna had later sold and transferred the land to a third party, X, then s. 340(2)(b) would not be applicable because the transfer would not be a forgery. X's title would be protected by the proviso to s. 340(3) if X paid value and acquired the land without notice of the forged transfer in Adorna's favour. This points to deferred and **not** to immediate indefeasibility.

Accordingly, in my judgment our courts should no longer treat themselves bound by the Federal Court judgment in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* as it was decided *per incuriam*. It follows that this court and the High Courts must now proceed on the basis that the Code provides for deferred and not immediate indefeasibility.

In the present case, the learned judge found the appellant not to be a witness of truth and rejected his evidence. It is on that basis that he held the appellant not to be a *bona fide* purchaser of the subject land. The burden of establishing that he was a *bona fide* purchaser for value lay on the appellant: See, *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; *Ong Chat Pang & Anor v. Valiappa Chettiar* [1971] 1 MLJ 224. The finding of the court below that the appellant was not a *bona fide* purchaser is one of pure fact based on the credibility of witnesses. In accordance with the well settled practice of this court I will not interfere with such a finding.

For the reasons already given, I was compelled to the conclusion that this appeal is devoid of merit. It was dismissed without calling upon learned counsel for the respondent. Orders were made that are usually consequent upon a dismissal.

Ahmad Fairuz JCA:

Saya telah membaca draf alasan penghakiman Gopal Sri Ram HMR dan saya bersetuju dengan penghakiman itu kecuali setakat mana penghakiman itu menyatakan bahawa keputusan Mahkamah Persekutuan di dalam kes *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 (Adorna Properties) adalah *per incuriam* dan oleh itu mahkamah-mahkamah tidak perlu lagi menganggap mereka terikat dengan keputusan itu.

Berasaskan prinsip duluan kehakiman mengikat (judicial precedent), saya berpendapat mahkamah ini tidak mempunyai pilihan kecuali menerima dan mematuhi keputusan Mahkamah Persekutuan di dalam kes *Adorna Properties*. Edgar Joseph Jr, HMP di dalam kes *Co-operative Central Bank Ltd (in receivership) v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365 berkata:

The question therefore arises: is it open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given *per incuriam*?

Our task in answering this question has been made considerably easier by the assistance derived from the remarks of Lord Hailsham in *Cassell & Co Ltd v. Broome & Anor* [1972] AC 1027, which indicated the reaction of the House of Lords to the Court of Appeal's refusal to follow a previous decision of the House on the ground that it was made *per incuriam*.

Touching on the repercussions of the Court of Appeal advising judges of first instance to ignore decisions of the House of Lords, Lord Hailsham said this (at p 1954B-D):

> I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided *'per incuriam'* or 'unworkable', they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to the judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lord Justices would have followed them and no particular reason why they should) and the House of Lords. But much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords and in the meantime, the task of their advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

And in a famous passage (at p 1054 D-E), Lord Hailsham concluded this part of the case by saying:

> The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co Ltd* [1944] 1 KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

> In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, the duty of the Court of Appeal to accept loyally the decisions of the House of Lords and the chaotic consequences which would follow should the Court of Appeal fail in this duty apply with full force, *mutatis mutandis*, to this country and we adopt what his Lordship said. Clearly the Court of Appeal in *Harta Empat* [1997] 1 MLJ 381 flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles.

Ketara ungkapan penghakiman yang dipetik di atas mengandungi prinsip-prinsip dan hujjah-hujjah yang munasabah. Justeru itu, saya berpendapat semua mahkamah yang bidang kuasanya lebih rendah dari Mahkamah Persekutuan hendaklah mematuhi kes itu sehingga ianya ditolak atau digantikan dengan kes perundangan yang lain dari Mahkamah Persekutuan.

Di dalam kes ini hakim perbicaraan telah membuat penemuan fakta bahawa perayu bukanlah seorang saksi yang bercakap benar dan atas asas itu beliau telah memutuskan bahawa perayu bukanlah pembeli *bona fide* tanah yang menjadi pertikaian. Justeru itu, saya menolak rayuan ini dengan kos.